RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

THEODORE WESBY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Metropolitan Police Department officers arrested for unlawful entry over sixteen individuals (Respondents here) who had gathered at a home in the District of Columbia. Under District of Columbia law, the offense of unlawful entry requires a culpable mental state. Specifically, an individual is guilty of the crime only if he knew or should have known that he entered a property "against the will of the lawful occupant or of the person lawfully in charge thereof" and intended to act in the face of that knowledge. D.C. Code § 22-3302; *see Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989). At the scene, Respondents informed the responding officers that they had been invited to the house by a woman whom they reasonably believed to be its lawful occupant. That woman confirmed to the officers by telephone that she had invited them. The officers, however, subsequently learned that she was not in fact a lawful resident of the premises.

The questions presented are:

1. Whether the officers had probable cause to arrest Respondents for unlawful entry under District of Columbia law when the available facts indicated that Respondents believed they had lawful authority to enter the premises.

2. Whether the officers were appropriately denied qualified immunity because it was clearly established at the time of arrest that

police lack probable cause to arrest for unlawful entry when there is no evidence the arrestee has the requisite culpable mental state.

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INTRODUCTION

This case presents the question whether officers lack probable cause to arrest under District of Columbia law for unlawful entry—a crime that requires that an individual knew, or should have known, that he was on the premises against the will of the lawful occupant—when the arrestees uniformly state they were invited by a specific individual who confirms to the officers that she invited them, but the police discover that she did not in fact possess lawful authority to extend the invitation.

The district court and the court of appeals held that Petitioners lacked probable cause to arrest Respondents because there was no evidence Respondents knew, or should have known, that their invitation was deficient. The district court and court of appeals further held that Petitioners were not entitled to qualified immunity because it was objectively unreasonable under clearly established law to arrest Respondents for unlawful entry in the absence of any evidence of wrongful intent. Nothing in Petitioners' petition for certiorari calls the correctness of the courts below into question, let alone warrants this Court's extraordinary review.

Petitioners claim the court of appeals created a conflict with other jurisdictions by applying a "heightened probable cause standard" that supposedly requires police officers to credit claims of an innocent mental state whenever made by suspects. Pet. 11-22. This overblown claim does not stand up to scrutiny. The court of appeals simply applied the familiar totality-of-the-circumstances test established by this Court and consistently applied by lower

courts. While Petitioners attempt to show a division of authority among jurisdictions, the cases they cite all involve other courts applying the *same* test to different facts. Petitioners' disagreement with the court of appeals' decision is in reality over how it applied this well-worn test to the facts of this case. The court of appeals' factual analysis is correct. But in any event, this factbound controversy does not merit this Court's review.

Similarly, the court of appeals applied the proper analysis to determine whether Petitioners are entitled to qualified immunity. Focusing its inquiry at a granular level of specificity, the court of appeals found it well-established that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense, including any state-of-mind element. Applying that standard, the court of appeals' conclusion that Petitioners are not entitled to qualified immunity is correct. In arguing to the contrary, Petitioners seek to relitigate the facts of this case rather than raise any substantial legal issue that merits this Court's attention.

The petition for certiorari should be denied.

STATEMENT

A. Factual Background.

In the early morning hours of Saturday, March 15, 2008, Respondents attended a party at a home in Northeast Washington, D.C. Pet. App. 47a. Officers from the D.C. Metropolitan Police Department (MPD) arrived at the house at approximately 1:30 a.m. in response to a call about the property. *Id.* After entering the residence, officers observed several

women who were "scantily dressed and had currency tucked into their garments." *Id.* at 48a. The home had folding chairs, a mattress, and working electricity and plumbing. *Id.* at 4a, 49a, 53a. One officer reported smelling marijuana, "but did not find any illegal narcotics and observed no illegal activity." *Id.* at 53a, 57a. Other officers similarly testified that they did not observe any illegal conduct. *Id.* at 57a, 58a, 60a.

Several Respondents told the officers "that a woman named 'Peaches' had invited [them] to the house for a bachelor party." *Id.* at 48a. Peaches was not at the home, but when reached by phone, told officers that she had just left the house and given Respondents permission to hold the bachelor party. *Id.* at 48a, 54a.

Peaches told officers that she had permission to occupy the property from the deceased property owner's grandson, Damion Hughes. Pet. App. 54a & n.7. Petitioner Andre Parker then spoke with Hughes, who stated that "he and Peaches were in the process of working out a leasing arrangement, but they never reached an agreement." *Id.* Based on that information, a sergeant on the scene directed Petitioners Parker and Anthony Campanale to arrest Respondents for unlawful entry. *Id.*

The MPD sergeant did not consider Respondents' subjective intent in ordering the arrests, erroneously believing that probable cause existed so long as Respondents, as an objective legal matter, lacked the right to be in the house. Pet. App. 51a, 56a-57a.

At the police station, the supervising lieutenant, upon consultation with upper level officers, disagreed

with the decision to arrest Respondents for unlawful entry and ordered their release. Pet. App. 51a-52a. However, after consulting with a representative of the District of Columbia Office of the Attorney General, the supervising lieutenant ordered that Respondents be charged with disorderly conduct. *Id.* at 52a. The disorderly conduct charge was made over the objection of the arresting sergeant, who complained that "there was no evidence [Respondents] had become loud or boisterous causing people to wake up, turn on their lights, and/or come outside to investigate a commotion." *Id.* The other officers at the scene likewise did not observe any activities consistent with a disorderly conduct charge. *Id.* at 49a.

The disorderly conduct charges were later dropped (*id.*), and this action followed.

B. District Court Proceedings.

Sixteen of the arrestees, Respondents here, sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District of Columbia for false arrest under common law, and the District of Columbia for negligent supervision, in the United States District Court for the District of Columbia. Pet. App. 6a. The parties filed cross-motions for partial summary judgment: Respondents moved for judgment on Petitioners' liability, whereas Petitioners moved for judgment based on qualified immunity. *Id.*

The district court granted Respondents' motion in part and denied Petitioners' motion in part. The district court concluded that "the officers did not have probable cause to support the unlawful entry arrest,"

and that "the arrests for disorderly conduct were made without probable cause." Pet. App. 66a-67a. The district court further concluded that Petitioners Parker and Campanale "failed to show, by undisputed facts, that it was objectively reasonable for these officers to rely on the information communicated by others at the scene to support the arrests." *Id.* at 78a. Accordingly, the district court concluded that those officers were "not entitled to qualified immunity . . . and, furthermore, that [Respondents] are entitled to summary judgment with respect to these two officers." *Id.* at 79a.

The district court, however, denied Respondents' summary judgment motion as to the disorderly conduct false arrest claims, which became the only claim on which liability was not determined. Pet. App. 99a. Following entry of the district court's summary judgment order, Respondents waived that claim, and the case proceeded to a damages-only trial as to Respondents' remaining claims against Officers Campanale and Parker, and against the District itself for negligent supervision. *Id.* at 121a. A jury awarded Respondents $680,000, and Petitioners appealed both the verdict and the summary judgment order to the United States Court of Appeals for the District of Columbia. *Id.*

C. Court of Appeals Proceedings.

The court of appeals, Judges Pillard and Edwards, affirmed. The court held that "Peaches' invitation vitiates the necessary element of [Respondents'] intent to enter against the will of the lawful owner. A reasonably prudent officer aware that [Respondents] gathered pursuant to an invitation

from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." Pet. App. 11a. The court of appeals also affirmed the district court's denial of qualified immunity, finding that "[t]he controlling case law in this jurisdiction . . . made perfectly clear at the time of the events in this case that probable cause required some evidence that [Respondents] knew or should have known that they were entering against the will of the lawful owner." *Id.* at 24a. Finally, the court of appeals affirmed the district court's award of summary judgment to Respondents on their common-law negligent supervision claim against the District itself. *Id.* at 30a. Judge Brown dissented from the majority opinion. *Id.* at 32a.

Petitioners then petitioned for rehearing en banc, which the court of appeals denied. Pet. App. 104a. Judges Pillard and Edwards filed an opinion concurring in that denial, and Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, filed an opinion dissenting from the denial of rehearing en banc. *Id.* at 105a, 116a. The dissent argued that the panel majority erred because the officers could reasonably have disbelieved Respondents' explanation "that they thought they had permission to use the house." *Id.* at 125a. In response, the concurrence expressed agreement "with virtually everything the dissent says about the law. Our disagreement is about the facts." *Id.* at 105a.

REASONS FOR DENYING THE PETITION

I. PETITIONERS ASK THIS COURT TO ENGAGE IN MERE ERROR CORRECTION OF THE COURT OF APPEALS' FACTBOUND PROBABLE CAUSE DETERMINATION.

A. The Court of Appeals Applied the Correct Probable Cause Standard.

In determining that the officers lacked probable cause to arrest Respondents for unlawful entry, the court of appeals, like the district court before it, applied the well-established totality-of-the-circumstances test for probable cause. The petition misconstrues the D.C. Circuit's reasoning in an unpersuasive attempt to manufacture a circuit split—but none of the cases relied upon by Petitioners applied a different legal standard. Rather, they all applied the familiar probable cause standard to different facts.

1. Under this Court's well-established Fourth Amendment jurisprudence, probable cause to arrest exists if "at the moment the arrest was made[,] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that" the suspects committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). This standard "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citations omitted). The touchstone of any probable cause analysis is whether there exists "a reasonable ground for belief of guilt." *Id.* (quoting

Brinegar v. United States, 338 U.S. 160, 175 (1949)). "[T]he belief of guilt must be particularized with respect to the person to be searched or seized." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). "[C]ommon rumor or report, suspicion, or even 'strong reason to suspect' [are] not adequate to support" an arrest. *Henry v. United States*, 361 U.S. 98, 101 (1959).

The evidence necessary to support a finding of probable cause is less than what would be necessary to support a conviction. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983). At the same time, however, because the evidence available to the arresting officers must support the conclusion that the suspect committed a crime, probable cause does not exist where there is no evidence establishing one of the elements of the offense. *See Williams v. City of Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir. 2014) ("For probable cause to exist, there must be probable cause for all elements of the crime."); *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense."); *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 745-46 (7th Cir. 2003) (probable cause to arrest exists "[o]nce an officer has established probable cause on every element of a crime").

Importantly, the totality-of-the-circumstances test requires that "the whole picture" be taken into account. *Alabama v. White*, 496 U.S. 325, 330 (1990) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). As the courts of appeals have consistently recognized, this means that facts showing that behavior is innocent must be considered and may

negate facts that, in isolation, would otherwise suggest guilt. Officers cannot "simply turn a blind eye toward potentially exculpatory evidence." *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007) (citations omitted); *see also Garcia v. Does*, 779 F.3d 84, 93 (2d Cir. 2014) ("[P]robable cause may be defeated if the officer deliberately disregards facts *known to him* which establish justification") (citation omitted) (emphasis in original); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1023-24 (9th Cir. 2009) ("As a corollary of the rule that the police may rely on the totality of facts available to them in establishing probable cause, *they also may not disregard facts tending to dissipate probable cause.*") (emphasis added) (alteration omitted) (quoting *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007)); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988) (same); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998) ("While officers may weigh the credibility of witnesses in making a probable cause determination, *they may not ignore available and undisputed facts.*") (emphasis added).

2. The D.C. Circuit faithfully applied this familiar probable cause standard. The court began by noting that "[a]n arrest is supported by probable cause if, 'at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that the suspect has committed or is committing a crime." Pet. App. 8a (quoting *Beck*, 379 U.S. at 91). The court noted that it must "'giv[e] due weight to the inferences drawn by the officers." *Id.* (quoting *Ornelas v. United States*,

517 U.S. 690, 697, 699 (1996)). And it noted that while "[p]robable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction[,]' . . . the police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense, including the requisite mental state." *Id.* at 9a-10a (quoting *Adams v. Williams*, 407 U.S. 143, 149 (1972)).

In keeping with these principles, the court of appeals recognized that under D.C. law, officers who make an arrest for unlawful entry "must have reasonable grounds to believe" that the suspects knew or should have known that they entered against the owner's express will. Pet. App. 10a (quoting *Carr v. District of Columbia*, 587 F.3d 401, 410-11 (D.C. Cir. 2009)). The court therefore examined "whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known that they had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof,' and intended to act in the face of that knowledge." *Id.* at 9a (quoting D.C. Code § 22-3302). In holding that a reasonable officer could not have so concluded, the court observed that: (1) Respondents uniformly stated that they had been invited to a party at the house; (2) the officers had uncontroverted statements from both Peaches and another attendee that Peaches told Respondents they could be there; and (3) the owner of the home was negotiating a lease with Peaches. *Id.* at 10a. In short, "[a] reasonably prudent officer aware that [Respondents] gathered pursuant to an

invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." *Id.* at 11a.

Nothing about the court of appeals' analysis departed from the well-worn totality-of-the-circumstances test established by this Court and applied over decades by lower courts. Petitioners claim the court of appeals created a "heightened" probable cause requirement by ruling that officers *must* accept a suspect's claim of an innocent state of mind even when there is reason to doubt the credibility of the claim. Pet. 11. But the court of appeals expressly *rejected* that rule, holding that "if the facts of which officers are aware and the reasonable inferences that arise from those facts cast doubt on a suspect's story, officers need not credit the suspect." Pet. App. 105a. The court simply found that on the facts of this case, all of the evidence available to the arresting officers indicated that Respondents had "gathered pursuant to an invitation from someone with apparent (if illusory) authority" and therefore did not possess the requisite mental state for unlawful entry under District of Columbia law. *Id.* at 6a. This is entirely consistent with this Court's totality-of-the-circumstances test and the requirement that a suspect cannot be arrested if there is insufficient evidence supporting an element of the offense.

3. Petitioners attempt to manufacture a division of authority by citing a number of supposedly analogous cases where other courts have found that probable cause for arrest existed despite a suspect's innocent explanation for his or her conduct. All of the cases upon which Petitioners rely, however, involved

application of the same probable cause standard to distinguishable facts. Specifically, Petitioners' cited cases all involved suspects whose credibility was undermined by significant circumstantial evidence of guilt and who lacked corroborating evidence supporting their proffered innocent explanation. *None* of Petitioners' cited cases involve circumstances similar to those presented here, where the suspects' consistent statements negating the requisite mens rea were independently corroborated at the scene. Petitioners' cases merely demonstrate that probable cause determinations—in keeping with the totality-of-the-circumstances test—turn on the particular facts of each case.

For example, in *Finigan v. Marshall*, 574 F.3d 57 (2d Cir. 2009), the suspect was arrested after using a locksmith to access her former home. *Id.* at 59. The suspect entered the home without her separated husband's consent or knowledge, but told authorities that "her divorce attorney told her she could do so." *Id.* at 60. Given the suspect's surreptitious entry into the house, that a report of burglary at the address had been made, that the husband had changed the locks, and that New York law prohibits a titled spouse from entering a residence without the resident spouse's permission, the Second Circuit reasonably concluded the officer had valid grounds for believing the suspect had committed a crime. *See id.* at 62-63 ("[U]nder New York law, a non-resident spouse who is a titled owner of a house and enters without the permission of the resident spouse may be convicted of burglarizing his or her own property.") (citations omitted).

In *Wright v. City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005), the Third Circuit found probable cause for police to arrest a suspect who broke a window to enter a house even though the suspect claimed she entered the residence to "retrieve her clothes and evidence of" a sexual assault. *Id.* at 603. There, however, the police were entitled to disbelieve the suspect's explanation because the retrieved items "were unlikely to help the police identify her attackers," and because she turned over the evidence "only after her mother alerted the police as to her possession of them." *Id.* Accordingly, the police officers' belief "was not unreasonable in light of the information the officers possessed at the time." *Id.* *Wright* thus differs from the present situation in that there were facts on the ground contravening the suspect's proffered explanation, and like *Finigan*, there was no independent corroboration of the suspect's intent.

Petitioners' remaining cases are all of a piece. Each contains similar distinctions—either the officers knew facts at the time of the arrest that contravened the suspect's proffered intent, or there was a lack of corroborating evidence of such intent, or both. *See State v. Newcomb*, 20 A.3d 881 (N.H. 2011) (suspect's innocent explanation for unlawful trespass was not supported by corroborating evidence, and explanation belied by nervous appearance and by actions inconsistent with innocent intent); *Criss v. Kent*, 867 F.2d 259 (6th Cir. 1988) (suspect's innocent explanation for receipt of stolen street sign was not supported by corroborating evidence and belied by the nature of the property); *Marks v. Carmody*, 234 F.3d 1006 (7th Cir. 2000) (suspect's proffered

explanation for why he wrote a bad check was not supported by any other evidence); *Royster v. Nichols*, 698 F.3d 681 (8th Cir. 2012) (officer entitled to disregard suspect's stated reason for refusing payment where other witnesses disputed the explanation); *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (photojournalist's innocent explanation for why she was at the scene of a criminal protest was both belied by other facts and not corroborated by other evidence); *Ramirez*, 560 F.3d at 1023-24 (police entitled to disregard suspect's innocent explanation where other facts, such as suspect's pulse rate and failures on sobriety field tests, belied explanation).

Nor, contrary to Petitioners' claims, is there any conflict between the rule applied by the D.C. Circuit and the rule applied by the District of Columbia Court of Appeals. *See* Pet. 16. Petitioners' cited cases all apply the same probable cause standard to distinguishable facts—specifically, to circumstances in which the suspects' innocent explanations were uncorroborated or unknown to the police at the time of the arrest. *See Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997) (although alleged fare-skipper offered an innocent explanation, it was uncorroborated and he became agitated when confronted by police); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285 n.2, 286 n.6 (D.C. 1974) (arresting officer did not know, at the time of the arrest, of the evidence corroborating the suspect's explanation); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578 (D.C. 1966) (alleged shoplifter's explanation that she had "forgotten" that she had the stolen merchandise was uncorroborated).

In sum, the petition does not identify precedent from any other court "in conflict" with the decision below "on the same important matter." S. Ct. R. 10(a). Like the dissenting opinion below, Petitioners merely disagree with the panel majority over whether the officers were presented with sufficient circumstantial evidence to overcome Respondents' proffered explanation for their presence and the evidence corroborating it. As the majority put it, "[o]ur disagreement ... comes down to our case-specific assessment of the circumstantial evidence in the record." Pet. App. 113a; *see also id.* at 105a ("The panel agrees with virtually everything the dissent says about the law. Our disagreement is about the facts."). Nothing in the petition for certiorari warrants this Court's review of that fact-bound determination.

4. If anything, it is Petitioners who seek to distort the probable cause standard. They effectively argue for a rule that arresting officers are permitted to ignore exculpatory evidence that is known to them. Under Petitioners' view, officers should always be able to claim that their "experience" and "judgment" establishes that a suspect who proffers an innocent explanation is lying so that probable cause for arrest exists—even where the innocent explanation is corroborated by the available evidence and no contrary evidence exists. Pet. 23-24. But that is inconsistent with the approach to probable cause established by this Court.

"In applying [the probable cause] test, [this Court] ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S.

33, 39 (1996). Just as it would have been improper for the court of appeals to hold—which it did not—that suspects' innocent explanations must always be *believed*, it would be improper to hold that police may always *discredit* suspects' innocent explanations even when those explanations are corroborated by other available evidence. Such an approach would not only establish a bright-line rule, contrary to this Court's precedents, it would give police license to arrest citizens engaged in innocent conduct and then justify the arrest after the fact through the bare assertion that they found the suspect not to be "credible."

B. The Court of Appeals' Determination That There Was No Probable Cause Was Correct; In Any Event, Petitioners Do No More Than Challenge the Application of Settled Law to the Facts of This Case.

Lacking any genuine discrepancy between the court of appeals' decision in this case and precedent from other circuits, Petitioners urge the Court to reverse the D.C. Circuit because they had probable cause to arrest under the facts. Pet. 17-22. Even putting aside the fact that this Court does not generally expend its resources to engage in error correction, the court of appeals correctly determined that Petitioners did not possess the necessary probable cause to arrest Respondents for unlawful entry.

At the time of the arrest, D.C. law made it a misdemeanor for a person "without lawful authority" to "enter, or attempt to enter, any public or private dwelling, building, or other property . . . against the will of the lawful occupant or of the person lawfully

in charge thereof." D.C. Code § 22-3302 (2008).[1] To establish a violation of the statute, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985). To satisfy the requisite mental state, the government must prove "that a defendant knew or should have known that his entry was unwanted." *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).

The court of appeals recognized that the quantum of proof needed to sustain probable cause is less than to succeed at trial, but correctly held that "the police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense, including the requisite mental state." Pet. App. 9a-10a; *see United States v. Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) (holding that officers lacked probable cause to arrest suspect for possessing dagger with intent to use unlawfully "[g]iven the possibility of a lawful purpose, and the absence of any evidence whatsoever that [the suspect] possessed the knife for an unlawful one"); *cf. Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (to have probable cause on mens rea element of trespass offense, officer must obtain "information supporting a conclusion that the potential defendant in a trespass case was

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[1] D.C.'s unlawful entry statute has since been amended. *See* D.C. Code § 22-3302. The court of appeals considered the previous version of the statute in conducting its analysis. Pet. App. 9a n.3.

not licensed or privileged and that he was so advised by the custodian of the property").

Petitioners lacked any evidence that Respondents intended to enter the house without lawful authority. Respondents uniformly stated that Peaches had invited them to a party at the house, and Peaches confirmed that understanding. Based on these facts, "[m]ultiple officers on the scene testified that they did not observe anything leading them to believe that [Respondents] had any reason to think they lacked the right to be in the house." Pet. App. 12a n.4. This was not a situation where the suspects provided conflicting accounts, or where there was any indication that Respondents made up their explanations; rather, it was a situation where arresting officers refused to consider corroborated, exculpatory evidence because they believed (erroneously) that intent is not an element of the crime.

In the courts below, Petitioners argued that Respondents' Fourth Amendment claim failed because social guests cannot challenge constitutional violations relating to seizures of their persons (Pet. App, 75a), because Petitioners were entitled to arrest on a showing less than probable cause (*id.* at 75a n.14), and because Respondents' bona fide belief that they had permission to enter the house is relevant only as a defense to a criminal prosecution (Pet. App. 10a-11a). Abandoning those meritless arguments, Petitioners now seek reversal on the sole ground that a reasonable officer could have disbelieved Respondents (even if Petitioners did not do so here).

Petitioners' factual arguments fail. Although innocent activity may form the basis of a probable cause finding, the requisite "degree of suspicion" to do so is missing in the present case. *Gates*, 462 U.S. at 243 n.13. Thus, Petitioners point to several facts that purportedly "discredited" Respondents' claim of a bona fide invitation. Pet. 17-18. Yet none of the evidence on which Petitioners rely indicates that Respondents entered the house against the will of the lawful owner.

First, Petitioners contend Respondents "were in a vacant home late at night." Pet. 17. Under D.C. law, however, the presence of a person in a vacant dwelling is not *prima facie* evidence that entry into the building was against the will of the owner unless the property is "boarded up or otherwise secured in a manner that conveys that it is vacant and not to be entered." Pet. App. 65a (quoting D.C. Code § 22-3302(a)(1) (2007)). In any event, the district court reasonably concluded that the house was not "vacant," *i.e.*, "completely empty." *Vacant*, BLACK'S LAW DICTIONARY (10th ed. 2014). "[I]t is undisputed that the electricity was working, the property contained a mattress, candles, chairs, food, and the bathrooms were functional." Pet. App. 65a; *see also id.* at 16a ("[T]here is nothing in the record suggesting that the condition of the house . . . should have alerted [Respondents] that they were unwelcome").

Second, Petitioners contend Respondents were engaged in "illicit behavior." Pet. 17. Because the officers uniformly testified that they did not observe illegal activity (Pet. App. 15a), Petitioners must mean

"illicit" in its alternative sense of "improper."[2] *Illicit*, BLACK'S LAW DICTIONARY (10th ed. 2014). But regardless of whether Petitioners' moral sensibilities are offended by the presence of "scantily dressed" women, the officers' observations provided no reason to doubt Respondents' explanation of lawful entry. Certainly, common sense does not suggest, and Petitioners proffered no evidence establishing, that trespassers are more likely to attend parties involving exotic dancing than non-trespassers.

Third, Petitioners suggest Respondents could be disbelieved because an unidentified number of partygoers told officers they were present for a birthday party whereas others claimed it was a bachelor party (as Peaches reported). Pet. 17; *see* Joint App'x 372. As an initial matter, the testimony upon which Petitioners rely was introduced at the trial on damages—*after* the district court decided Respondents' summary judgment motion—and therefore cannot be relied upon to cast doubt on the district court's liability determination. *See, e.g.*, *Griffin v. Sirva Inc.*, No. 15-1307, --- F.3d ---, 2016 WL 4524466, at *3 (2d Cir. Aug. 30, 2016) (collecting cases holding that district court's grant of summary judgment must be examined independently of evidence presented at trial). There was no evidence in the summary judgment record that any of the partygoers told police they were present for a birthday party:

- Respondents uniformly testified that they were at the home for a bachelor party. *See*

[2] Officers testified that they neither found illegal drugs in the home, nor observed any drug-related activity. Pet. App. 4a n.1.

Hunt Dep., Dist. Ct. Doc. No. 25-2, at 3 (Jan. 11, 2011) ("We went there to do a bachelor party."); Chittams Dep., Dist. Ct. Doc. No. 31-10, at 3 (Apr. 1, 2011) ("Tasty said she knew a guy that was having a bachelor party."); Taylor Dep., Dist. Ct. Doc. No. 31-14, at 3 (Apr. 1, 2011) ("A bachelor's party, yes, sir."); Cole Dep., Dist. Ct. Doc. No. 31-15, at 3 (Apr. 1, 2011) ("I was going to a bachelor party.").

- The arresting sergeant testified that Peaches said "she gave the people who were inside the place, told them they could have the bachelor party." Suber Dep., Dist. Ct. Doc. No. 33-3, at 4 (Apr. 18, 2011).
- The arrest report contained no mention of conflicting statements. Arrest Rep., Dist. Ct. Doc. No. 31-4 (Apr. 1, 2011).
- Multiple officers, including the officer who testified during the trial about the conflicting statements, did not mention any conflicting statements during their depositions or in their interrogatory responses when asked to justify their arrests of Respondents. *See* Campanale Interrog., Dist. Ct. Doc. No. 31-19 (Apr. 1, 2011); Campanale Dep., Dist. Ct. Doc. No. 31-16, at 4 (Apr. 1, 2011) ("Q: And what was your basis for arresting somebody for unlawful entry? A: That they did not have permission to be inside the residence."); Newman Dep., Dist. Ct. Doc. No. 33-7, at 6 (Apr. 18, 2011) ("The facts that led me to

believe that [there was probable cause] was [sic] that no one knew who the owner was.").

- Petitioners never presented their conflicting-statements theory in either their summary judgment briefing, *see* Defs.' Opp'n to Pls.' Mot. for Summ. J., Dist. Ct. Doc. No. 30, (Apr. 1, 2011); Defs.' Mem. in Supp. of Mot. for Summ. J., Dist. Ct. Doc. No. 31-1 (Apr. 1, 2011); Defs.' Reply in Supp. of Mot. for Summ. J., Dist. Ct. Doc. No. 36 (May 12, 2011), or in their statements of fact, *see* Defs.' Opp'n to Pls.' Stmt. of Facts, Dist. Ct. Doc. No. 30-1 (Apr. 1, 2011); Defs.' Stmt. of Facts, Dist. Ct. Doc. No. 31-2 (Apr. 1, 2011).

In any event, this evidence does not present grounds to disbelieve the partygoers' consistent statements that they were invitees. Given that some partygoers were invited by Peaches directly and others by another guest (Pet. App. 4a), it is hardly surprising the twenty-one suspects failed to give a uniform answer. Critically, nothing Respondents told the officers gave any reason to doubt they believed their invitation to attend a party—of whatever sort—was extended by an individual without lawful authority. The inconsistency identified by Petitioners is "simply too minor and insignificant to give rise to any reasonable suspicion of any criminal activity." *United States v. Pack*, 612 F.3d 341, 360 (5th Cir. 2010).

Fourth, Petitioners claim that because "Peaches" was evasive when officers reached her by phone, the officers could have inferred that she invited

Respondents "in a manner that alerted or suggested that she was without actual authority to do so." Pet. 18. Petitioners' argument, however, is wholly divorced from the facts of the case, as testified to by the arresting officers. When the officers spoke to Peaches on the phone and asked whether she had permission to use the house, she had every reason to disclaim having authorized the party. She was absent from the scene, after all, and implicated only because the partygoers had stated she invited them. Instead, she *confirmed* to the officers "that she gave the people who were inside the place, told them they could have the bachelor party." Pet. App. 50a (quoting testimony of Sergeant Andre Suber). Only when the officers pressed Peaches on the lawfulness of her *own use* of the house did she "bec[o]me evasive and h[a]ng up the phone." *Id.* "[T]here is simply no evidence in the record that [Respondents] had any reason to think the invitation was invalid." *Id.* at 12a. Indeed, Petitioners did not even ask Peaches or the house's owner whether Respondents knew Peaches had no right to be in the house. *Id.* at 12a n.4. Probable cause to arrest cannot be predicated on "[t]he bare, unsupported possibility" that Respondents were invited to use the house in a manner that alerted them to Peaches' lack of authority in the absence of any facts suggesting that to be the case. *Id.* at 112a.

Finally, Petitioners state that probable cause existed because the partygoers "scattered and hid when uniformed officers" entered the home. Pet. 17. The evidence is that when an individual opened the door, one officer "could see people in the house scattering into different rooms." Joint App'x 150.

Even headlong flight, however, though it "may be 'suggestive' of wrongdoing, . . . is not sufficient standing alone to create probable cause." Pet. App. 16a (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)); *see also United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012) ("unprovoked flight, without more, can not [sic] elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest"). That a group of partygoers engaged in observing semi-nude dancing in a house in Northeast D.C. at 1:30 a.m. left the room rather than talk to the police is hardly surprising. Many citizens do not have confidence that even routine interactions with the police will end well. If "headlong flight" from police, without more, does not establish probable cause for an arrest, the "scattering" of a group of partygoers under these circumstances does not establish that they were at the house unlawfully. And because none of the other facts highlighted by Petitioners gave the officers reason to doubt Respondents' state of mind, Petitioners are not aided by the principle that probable cause is a "totality of the circumstances" test. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013).

That leaves Petitioners to rely on their post-hoc claim that a reasonable officer could have concluded—on the basis of nothing more than hypothesized indicia of untruthfulness not testified to by any of the officers present at the scene—that Respondents' statements were not credible. In rejecting this argument, the court of appeals did not, contrary to Petitioners' claim, require "direct, affirmative proof" that Respondents had the requisite mens rea. Pet. 19. On the contrary, the court of

appeals expressly allowed that "circumstantial evidence may 'make it reasonable to infer' that a suspect has a culpable state of mind." Pet. App. 106a; *see also id.* at 14a. But the court of appeals *did* quite properly require *some* circumstantial evidence grounding such an inference. And as the record establishes, "nothing about what the police learned at the scene"—circumstantial or otherwise—"suggest[ed] that [Respondents] 'knew or should have known that [they were] entering against the [owner's] will.'" *Id.* at 64a.

C. The Petition Does Not Present a Question of Nationwide Importance.

At root, the petition for certiorari asks this Court to review the D.C. Circuit's application of well-settled law to the particular facts of this case. But this Court does not normally engage in error correction. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioners and their *amici* claim that this Court's intervention is necessary to avoid chilling police activities. Pet. 23-24; States' Amicus Br. 6-9. But these claims are overblown. This case does not involve, as Petitioners urge, the question whether police officers must credit a suspect's naked excuse for unlawful conduct. *See* Pet. 23 ("The drugs in my locker aren't mine.") (quoting Pet. App. 126a); *see also* States' Amicus Br. 11. As the court of appeals explained, nothing about its decision requires officers "to accept suspects' implausible protestations of innocence and ignore other, circumstantial evidence

of culpability." Pet. App. 105a. Rather, the opinion below merely addresses whether officers have probable cause to arrest for unlawful entry under D.C. law—an offense with a well-established mens rea requirement—when the suspects' statements that they believed they entered lawfully are fully corroborated by facts known to the arresting officers.

Moreover, a case such as this one—where individuals provide a corroborated claim to have authorization for an action, and the authorization renders their conduct innocent, but the ultimate basis for the authorization proves flawed for reasons of which they are unaware—is unlikely to recur often in the future, making review by this Court unnecessary.

II. THE COURT OF APPEALS APPLIED THE CORRECT QUALIFIED IMMUNITY ANALYSIS, AND ITS DENIAL OF QUALIFIED IMMUNITY WAS CORRECT.

The court of appeals held that Respondents are not entitled to qualified immunity because it is well established that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense, including any state-of-mind element. The court of appeals' holding was both formulated at an appropriate level of specificity and correct on the facts. Petitioners attempt to manufacture uncertainty by relying on a series of factually distinguishable cases. Reduced to its essence, Petitioners' argument is that the court of appeals misinterpreted the facts of this case. That argument does not justify a grant of certiorari.

A. The doctrine of qualified immunity shields officials from civil liability only if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (alteration omitted). Whether the violative nature of particular conduct is clearly established must be assessed "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted). At the same time, this Court has rejected the idea that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Instead, what is required is that "in the light of pre-existing law[,] the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The crux of the qualified immunity test is whether officers have "fair notice" that they are acting unconstitutionally. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

The court of appeals' qualified immunity analysis conforms to this Court's precedents. Recognizing that "[i]t is not enough to reiterate that the Fourth Amendment's restrictions against arrest without probable cause are clearly established," the court focused its inquiry "at a finer level of specificity." Pet. App. 22a. The court of appeals stated the applicable

constitutional rule as follows: "The law in this jurisdiction has been well established for decades that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element." Pet. App. 23a. As the court of appeals explained, this rule is firmly established in decisions announced by the District of Columbia Court of Appeals, the Court of Appeals for the District of Columbia Circuit, and by courts of appeals for other circuits.

First, the D.C. Circuit has clearly held that there must be some evidence of the suspect's mental state to arrest an individual when the crime of arrest contains a state-of-mind element. In *United States v. Christian*, the D.C. Circuit held that officers lacked probable cause to arrest an individual for possessing a dagger with the intent for unlawful use in the absence of creditable evidence of the suspect's intent. 187 F.3d at 667. The *Christian* court found that the circumstances of the dagger's supposed lack of utilitarian purpose and the suspect's presence in a high-crime neighborhood were insufficient to ground an inference that the suspect possessed the requisite mens rea. These circumstances, the court found, did not negate the obvious lawful use of the dagger—self-defense. "[T]he officers did not simply lack the 'type of specific evidence of' [the suspect's] intent 'as would be needed to support conviction,'" the D.C. Circuit held, "they lacked any evidence at all that [the suspect] intended to use the dagger unlawfully. Without such evidence, there was no probable cause for arrest." *Id.* (quoting *Adams*, 407 U.S. at 149).

This decision squares with decisions from other courts of appeals finding that officers need evidence of the suspect's mental state to have probable cause to arrest for a crime with a mens rea requirement. *See, e.g.*, *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[W]hen specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred."); *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (holding that to have probable cause under a statute requiring knowing or willful conduct, officers "needed some evidence" to satisfy this element).

Second, there is no ambiguity in District of Columbia law that the crime of unlawful entry possesses a mens rea requirement. "[I]t has been long understood" in the District of Columbia that the crime of unlawful entry requires the government to prove the suspect intended to be on the property "contrary to the will of the lawful owner." *Ortberg*, 81 A.3d at 307. Accordingly, the government must prove "that a defendant knew or should have known that his entry was unwanted." *Id.* at 308. As the *Ortberg* court further recognized, it is well established that "a defendant 'lacks the requisite criminal intent for unlawful entry' 'when a person enters a place with a good purpose and a bona fide belief in his or her right to enter.'" *Id.* (quoting *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993)) (alterations omitted); *see also Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971) ("Where a person enters a place with a good purpose and with a bona fide belief of his right to enter, he lacks the element of criminal intent required ... and is not guilty of unlawful entry.").

As Petitioners "perform their functions in a single jurisdiction," they "'reasonably can anticipate when their conduct may give rise to liability for damages' and so are expected to adjust their behavior in accordance with local precedent." *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Accordingly, the court of appeals properly asked whether, under these precedents, "it was objectively reasonable" for the arresting officers "to conclude that there was probable cause to believe Plaintiffs were engaging in . . . unlawful entry." Pet. App. 21a. And the court determined, in light of the absence of facts indicating that Respondents knew that Peaches' invitation was not grounded in actual authority to invite them, that it was not.

B. Contrary to the claims of Petitioners and their *amici*, the court did not apply a rule formulated at an improperly high level of generality or a rule that was not clearly established.

First, Petitioners contend that even if it is clearly established that there must be some evidence of the suspect's mental state to arrest for a crime containing a state-of-mind element, "this is not the level of specificity this Court requires." Pet. 25. According to Petitioners, the proper question is whether probable cause to arrest exists when officers confront "persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were

invited by someone who is not present and is uncooperative and untruthful with police." *Id.* at 26.[3]

Petitioners frame the question far too narrowly. Although courts should not define "clearly established law at a high level of generality," *al-Kidd*, 563 U.S. at 742, it does not follow that police officers are entitled to qualified immunity whenever a novel factual situation arises, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009). Thus, this Court has rejected Petitioners' position that "the very action in question [have] previously been held unlawful." *Wilson*, 526 U.S. at 615. Given cases such as *Christian*, as well as the long-standing jurisprudence recognized by the District of Columbia Court of Appeals in *Ortberg*, Respondents had "fair and clear warning" that Respondents could not be arrested for unlawful entry in the face of their corroborated exculpatory statements absent evidence that Respondents knew or had reason to know their inviter was not a legal resident of the premises. *United States v. Lanier*, 520 U.S. 259, 271 (1997).

Second, Petitioners erect a straw man, arguing that the rule applied by the court of appeals is not clearly established because a number of circuit courts and state supreme courts, in addition to courts within the District of Columbia, have purportedly "held (and

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[3] Petitioners' framing of the question relies on improper factual inferences. For purposes of qualified immunity, the facts must be viewed in the light most favorable to Respondents (the non-moving party on this issue). *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). As explained above, the evidence in the record established that the home was not vacant. And Petitioners' contention that Respondents were "behaving suspiciously" is a conclusory statement unsupported by the evidence.

continue to hold) that probable cause exists to arrest for trespassing, even though the suspect asserted a good-faith claim of right." Pet. 26. The court of appeals, however, did not hold that officers may never arrest for unlawful entry when the suspect offers an innocent explanation. And none of Petitioners' cited cases conflicts with the court of appeals' actual holding that some evidence of mens rea is required to arrest for a crime that possesses a mental-state element.

As already explained, *none* of Petitioners' federal authorities address a good-faith claim of right where that good faith is corroborated by independent, uncontroverted evidence. *See supra* at Part I.A.3.

Petitioners' argument that the court of appeals' opinion runs contrary to established District of Columbia law is similarly unpersuasive. None of the cited cases involve a situation where the suspect's explanation for being in the premises was corroborated by independent evidence. In *McGloin v. United States*, 232 A.2d 90 (D.C. 1967), for example, the suspect's stated explanations—looking for a cat, or looking for a friend—were contradictory and lacked any corroboration. *Id.* at 90-91. Likewise, in *Ortberg*, 81 A.3d 303, the suspect's uncorroborated explanation—that he did not know the fundraiser was a private event—was belied by the presence of a registration table, and the suspect's attempts to stall his ejection. And in *Artisst v. United States*, 554 A.2d 327 (D.C. 1989), a prominently-posted warning obviated the suspect's innocent explanation; even if it were true that a resident had invited the suspect in, that invitation would not have justified entry in the

face of the warning requiring presentation of identification to a security guard.

The only other citation Petitioners provide in support of this argument is *Kozlovska v. United States*, 30 A.3d 799 (D.C. 2011), which, Petitioners say, upheld the "conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building." Pet. 27. The suspect's explanation, while *unrebutted*, was not *corroborated* by the superintendent who purportedly gave the defendant permission to enter. In fact, the lack of corroboration is part of the reason that the trial court found the suspect not credible. *Kozlovska*, 30 A.3d at 803. Here, Respondents' explanations were both unrebutted and corroborated.

Third, the claim of Petitioners' *amici* that the court of appeals created a new rule and retroactively applied it to the officers in this case is based on a blatant misreading of the opinion below. Relying primarily on citations to a concurrence in denial of rehearing en banc that does not embody the holding below, the States misconstrue the court of appeals' holding as turning on the subjective mental state of the arresting officers. States' Amicus Br. 14-21. But the court's holding does no such thing.

The court specifically rejected the argument that the officers' subjective assessment of the facts was relevant to the probable cause determination, stressing that "[a]s long as the arresting officers had an objectively valid ground upon which to make an arrest, . . . the subjective knowledge and intent of the officers is irrelevant." Pet. App. 18a. Instead, the

court held that the probable cause inquiry focuses on "whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known that they had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof,' and intended to act in the face of that knowledge." Pet. App. 9a. The court accordingly focused on whether the facts known to the officers indicated that Respondents entered the house without the express consent of someone they believed to be the lawful occupant. Pet. App. 12a.

At bottom, the States—like Petitioners—simply disagree with what the facts show. Indeed, the States concede that the court of appeals' assessment of the evidence "if true, would have eliminated probable cause for the arrest." States' Amicus Br. 15. But this Court does not ordinarily grant review to determine if disputed facts are "true" or not.

Fourth, because the court of appeals applied a well-established rule, Petitioners' assertion that affirming the district court will punish officers who lacked "fair warning" of an "obvious" constitutional principle is misguided. Pet. 28. As both the district court and the court of appeals noted, officers *at the scene of the investigation* admitted that the facts known to them at the time did not establish probable cause to effect an arrest. *See* Pet. App. 6a (explaining that both the commanding lieutenant and a representative from the District of Columbia's Attorney General's office agreed to change the charge from unlawful entry to disorderly conduct); *id.* at 12a n.4 ("Multiple officers on the scene testified that they did not observe anything leading them to believe that [Respondents]

had any reason to think they lacked the right to be in the house."); *see also id.* at 52a. Petitioners' argument that the lack of probable cause was not obvious falls flat in the face of their own agents' contrary testimony.

Finally, this Court should not reverse merely because four judges on the court of appeals found that probable cause existed, as Petitioners suggest. Pet. 28. Taken to its logical extreme, Petitioners' argument would require courts to afford qualified immunity to officers any time any jurist believed that a constitutional violation had not occurred. Petitioners' argument is unsupported by this Court's precedent. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 576 (2004) (denying qualified immunity even though three Justices believed that "despite the invalid warrant, the resulting search was reasonable and hence constitutional") (Thomas, J., dissenting). The dissenting judges below, like Petitioners here, merely disagree that the record supports probable cause. That factbound disagreement does not warrant this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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